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No. 84 1144

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN VON NEUMANN

BRIEF FOR RESPONDENT JOHN VON NEUMANN

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QUESTIONS PRESENTED

1. Does the protection of due process apply to persons petitioning for remission of penalties under 19 U.S.C. 1618 after seizure of a vehicle?

2. Assuming the Due Process Clause applies, does it include some standard of a reasonable time period within which a decision on the petition must be made?

3. Was the 36 day time period expended in determining the petition for remission in this case unreasonable as a matter of law, reasonable as a matter of law, or subject to determination by the District Court on remand?

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In the Supreme Court of the United States

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v.

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENT JOHN VON NEUMANN

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-12a) is reported at 729 F. 2d 657. The previous opinion of the Court of Appeals (Pet. App. 15a-32a) is reported at 660 F. 2d 1319.[1] The findings of fact and conclusions of law of the District Court (Pet. App. 35a-40a) are unreported.

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[1] That opinion as reported does not contain the modifications that the Court of Appeals made to its decision in denying the government's petition for rehearing. See Pet. App. 33a-34a.

JURISDICTION

The judgment of the Court of Appeals was entered on March 30, 1984. A petition for rehearing was denied on September 18, 1984 (Pet. App. 13a-14a). On December 6, 1984, Justice Rehnquist granted an extension for filing a petition for a writ of certiorari to January 15, 1985. The petition was filed on that date and was granted on April 29, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

19 U.S.C. 1497 provides:

> Any article not included in the declaration and entry as made, and, before examination of the baggage was begun, not mentioned in writing by such person, if writter declaration and entry was required, or orally if written declaration and entry was not required, shall be subject to a forfeiture and such person shall be liable to a penalty equal to the value of such article.

19 U.S.C. 1618 provides in pertinent part:

> Whenever any person interested in any vessel, vehicle, merchandise, or baggage seized under the provisions of this chapter, or who has incurred, is alleged to have incurred, any fine or penalty thereunder, files with the Secretary of the Treasury if under the customs laws * * * a petition for the remission or mitigation of such fine, penalty, or forfeiture, the Secretary of the Treasury, * * * if he finds that such fine,

penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just * * *.

STATEMENT

Respondent accepts the factual statement set forth in the Brief of the United States, pages 2-8.

SUMMARY OF ARGUMENT

I.

Due process protection applies to petitions for remission under 19 U.S.C. 1618.

Johns v. McKinley, 753 F. 2d 1195, 1203 (2d. Cir. 1985) stated that the owner of a seized vehicle "was seeking to protect an existing cognizable property interest. He was the owner of the cab; and his ownership had not been extinguished by a declaration of forfeiture." This authority answers the government's contention that due process does not apply because no propery interest is involved after seizure.

The government's argument that a petition for remission is an admission of forfeitability was rejected by this Court in United States v. $8850, 461 U.S. 555, 566 (1983). The Court said: "The claimant need not waive his right to a prompt judicial hearing simply because he seeks the additional remedy of an administrative petition for mitigation."

Respondent is not like a prisoner in custody as the government contends. Respondent is a person who was deprived of his property with-

out a hearing. Unlike a penal authority deciding whether to release a prisoner, the government benefits greatly from the remission procedure because it may "obviate the need for judicial proceedings. This delay can favor both the claimant and the government..." (United States v. $8850 at page 566)

The government concedes at page 10 of its brief: "The Due Process Clause applies to the deprivation of the claimant's ownership interest in the seized property..."

This court in $8850 noted, and the government agrees, that the petition for remission is one step in the entire process by which the final rights and obligations of property owners and the government are determined in seizure cases.

Since the Fifth Amendment forbids depriving a person of his property without due process of law, and since a person is deprived of his property during the period of consideration of the petition for remission, due process applies to the petition for remission procedure. Applicability of the Due Process Clause is more clear because a petition for remission is an integral part of the administrative and judicial process by which the individual's property interest is determined.

II.

Due process protection does include the right to a determination of the petition for remission within a reasonably prompt period.

The government has not cited a single case which holds that an element of due process does not include the right to a reasonably prompt determination of the issue involving the right or property. On the contrary, the government concedes at page 27 of its brief: "Basically, due process guarantees that a proceeding be fair; '[t]he fundamental requirement of due

process is the opportunity to be heard at a meaningful time and in a meaningful manner', Matthews v. Eldridge, 424 U.S. 319, 333 (1976) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1962)."

This language is almost identical to that used by this Court in United States v. $8850, 461 U.S. at pages 562-563 where it posed the question before it as "when a post-seizure delay may become so prolonged that the disposed property owner has been deprived of a meaningful hearing at a meaningful time."

The Ninth Circuit in the case at bar and the Second Circuit in Lee v. Thornton, 538 F. 2d 27 (1976), recognized the vital needs of individuals to have the use of their vehicles, and to have a prompt determination of their rights to recover their vehicles if they are seized. A person whose property is seized should be able, within a reasonably prompt period of time, to make plans to resist a judicial forfeiture proceedings, or to acquire a substitute vehicle. The government so concedes at pages 33-34 of its brief where it states: "It is undoubtedly true that a claimant may desire a prompt ruling on his remission petition even if he has no opportunity to seek review of that decision and even if it turns out to be unfavorable."

The length of time which may be imposed upon the Secretary of the Treasury to act upon petitions for remission may be open to debate, but that some standard of reasonable promptness is required cannot be doubted.

III.

The 36 day delay in processing respondent's petition for remission was unreasonable as a matter of law, and the $3600 fine should be returned to respondent. At the very least, it is a question of fact for the District Court to determine whether the delay was unreasonable

under the standards set forth in $8850.

In ruling on this case the Court is making a general rule which will apply to all persons whose vehicles are seized. The obligation of the Customs Service to act with reasonable promptness must be the same regardless of the financial circumstances of the individual involved.

Because respondent was financially able to post a bond within two weeks of the seizure and regain his vehicle does not mean that the average citizen would not suffer substantial prejudice from being deprived of his vehicle.

Respondent cannot be held to have waived his right to a prompt determination of his petition for remission by posting a bond. Respondent's submission of supplemental information can reasonably be construed as an effort to hurry the Customs Service to make it's decision.

Deprivation of a vehicle for over 30 days will, as a general rule, cause substantial prejudice via lack of mobility, loss of earning ability, and possible loss of the vehicle.

The government has at all times argued it was not bound to act reasonably or with any degree of promptness in processing the petition for remission. The government admits it did not act with any such standard in mind. Respondent's vehicle was seized over ten years ago. This $3600 litigation should be resolved in respondent's favor as a result of the government's failure to act within the requirements of the Due Process Clause.

ARGUMENT

I.

DUE PROCESS PROTECTION APPLIES TO PETITIONS FOR REMISSION UNDER 19 U.S.C. 1618.

The analysis of the Second Circuit in Johns v. McKinley, 753 F. 2d 1195 (1985) totally

rebutts petitioner's argument that the Due Process Clause does not apply to petitions for remission. The court noted that the owner of a seized automobile "was seeking to protect an existing cognizable property interest. He was the owner of the cab; and his ownership had not been extinguished by a declaration of forfeiture." (at p. 1203; emphasis added.)

The government's argument, that the petition for remission is based upon a recognition of the validity of the forfeiture and admitted culpability, is entirely unfounded. United States v. Stowell, 133 U.S. 1 (1890), relied upon by the government held only that after judicial validation, the date of the forfeiture was retroactive to the seizure, thus eliminating claims of interim bona fide purchasers. Ivers v. United States, 581 F. 2d 1362 (9th Cir. 1978) was discussed in the first United States v. Von Neumann case, 660 F. 2d 1319 (1981). Appendix B, page 27a. The court noted that: "The balance of the Ivers opinion suggests that due process does require a prompt resolution of administrative claims."

The United States Supreme Court in United States v. $8850, 461 U.S. 555 at page 557 stated:

> [T]he Customs Service generally follows the procedures governing forfeitures for violations of the customs laws, as set forth in 19 U.S.C. §§1602 et seq., and the implementing regulations. Under these procedures, the Customs Service notifies any person who appears to have an interest in the seized property of the property's liability to forfeiture and of the claimant's right to petition the Secretary of the Treasury for remission or mitigation of the forfeiture." (emphasis added.)

The government tries to analogize the Secretary's position on a petition for remission to that of a penal authority holding a prisoner.

Petitioner not only ignores that the claimant has "an existing cognizable property interest" in the vehicle, but also that the government benefits greatly from the remission procedure. As this Court in $8850 noted at page 566:

> "An important justification for delaying the initiation of forfeiture proceedings is to see whether the Secretary's decision on the petition for remission will obviate the need for judicial proceedings. This delay can favor both the claimant and the government... Finally, a system whereby the judicial proceeding occurs after administrative action spares litigants and the government from the burden of simultaneously participating in two forums."

The Court in $8850 repeatedly recognized that seized property was only "subject to forfeiture". (See e.g. 461 U.S. at page 558, and footnote 12, at page 562.)

The government admits at page 10 of its brief:

> "The Due Process Clause applies to the deprevation of the claimant's ownership interest in the seized property, and therefore he has a right to a hearing on the question of forfeitability."

The government's argument that a petition for remission is some concession of forfeitability or a waiver of a right to contest forfeitability was expressly rejected by this Court in $8850 at page 566. The Court said: "The claimant need not waive his right to a prompt judical hearing simply because he seeks the additional remedy of an administrative petition for mitigation."

At page 17 of it's brief, the government argues that "the statute establishing the remission and mitigation remedy does not create a property interest." The government misses the point that the "property interest" exists independently of the statute. The petition for remission procedure is just one step in which it

is determined whether that property interest will be extinguished via a judical foreclosure proceeding. Respondent does not rely upon the statute to create the "existing cognizable property interest."

Respondent had a cognizable property interest in the vehicle protected by the Due Process Clause until there was an adjudication of the forfeitability of the vehicle. Until such adjudication, he was being deprived of that property interest. The Court in $8850 noted at pages 563-564:

> "While the value of allowing the government time to pursue its investigation applies to the civil forfeiture situation as well as the criminal proceedings, a major distinction exists. A suspect who has not been indicted retains his liberty; a claimant who's property has been seized, however, has been entirely deprived of the use of the property."

Due process applies to protect the claimant against unreasonable deprivation of the use of his property until such time as it is judicially determined that the claimant forfeited his interest in the property by a wrongful act.

II.

DUE PROCESS PROTECTION DOES INCLUDE THE RIGHT TO A DETERMINATION OF THE PETITION FOR REMISSION WITHIN A REASONABLY PROMPT PERIOD.

On page 10 of its brief, the government argues: "Even if due process protections do apply to the remission procedure, those protections should not include a right to a speedy disposition."

The government has not cited a single case which holds that an element of due process does not include the right to a reasonably prompt determination of the issue involving the right or property. On the contrary, the government

concedes at page 27 of it's brief: "Basically due process guarantees that a proceeding be fair; "[t]he fundamental requirement of due process is the opportunity to be heard at 'a meaningful time and in a meaningful manner'." Matthews v. Eldridge, 424 U.S. 319, 313 (1976) (quoting Armstrong v. Manza, 380 U.S. 545, 552 (1965)."

There may be a question as to the time period involved, but there is never any question that some standard of timeliness is present.

In $8850, at pages 562-563, the Court posed the question as: "when a post-seizure delay may become so prolonged that the disposed property owner has been deprived of a meaningful hearing at a meaningful time."

At pages 566-567, the Court in $8850 noted there could be "unreasonable delay in processing the administrative petition." The government's contention that because the petition for remission is subject to the Secretary's discretion on the merits, no standard applies for the time in which a decision must be made, was expressly rejected in Johns v. McKinley, F. 753 2d 1195, 1201 (2d. Cir. 1985). The court said:

> "Finally, although the matter of whether or not to grant a petition for mitigation appears to be committed to the government's unfettered discretion, and hence Johns would have no right to have the district court either compel a favorable decision or overturn the denial of his petition, we believe that factor is not dispositive of whether he had a constitutional right to a reasonably prompt decision."

Matthews v. Eldridge, supra and Cleveland Board of Education v. Loudermill, 84 L.Ed. 2d 494 (1985) are totally distinguishable from the case at bar. They both involved situations where an initial decision was made in a reasonable time. The issue in those cases was not the time of the decision made by the govern-

ment agency, but the nature of the hearing and evidence upon which the decision was based. The Court held in both cases that a prompt decision based upon an opportunity to be heard satisfied due process requirements, while a more detailed evidentuary hearing could be held subsequent to the original decision. The issue in this case does not involve the nature of the hearing or evidence to be considered by the Customs Service, but the time of the decision.

Heckler v. Day, 81 L.Ed. 2d 88 (1984) is distinguishable because the Court was relying upon "the unmistakable intention of Congress" in refusing to set mandatory judicial guidelines (at page 100). That case also involved adjudication of disputed disability claims after an initial denial. The Court noted these were "steps two and three" of the administrative process (at page 93). The petition for remission in seizure cases is the first step and the first consideration of the merits of any kind.

This Court in $8850 noted, and the government concedes, that the petition for remission is one step in the entire process by which the final rights and obligations of property owners and the government are determined in seizure cases. The petition for remission is analogous to a settlement negotiation. The property owner seeks to ascertain if the government will accept less than the total value of the property based upon his lack of moral turpitude, and in consideration of the benefit to the government in not having to initiate a judicial forclosure proceeding.

Since all parties acknowledge that the judicial forclosure proceeding will not take place before determination of the petition for remission, and since the Due Process Clause requires reasonably prompt institution of judicial forclosure proceedings, it necessarily follows that the due process right applicable to petitions for remission requires a determination with reasonable

promptness.

This Court in $8850, at page 563, rejected the government's contention that United States v. Lovasco, 431 U.S. 783 (1977) "provides the appropriate test for determining whether the delay violates the due process command." Instead, the Court said: "a more apt analogy is to a defendant's right to a speedy trial once an indictment or other formal process has issued." The Court therefore applied the four factor test of Barker v. Wingo, 407 U.S. 514 (1972).

The petition for remission and institution of judicial forfeiture proceedings are part of the same process. They determine rights in the same property, based upon the same set of facts. The Barker v. Wingo test applies to the entire process, not just the last half.

Another reason why a prompt determination is important is the claimant's right to know where he stands. The Ninth Circuit in the case at bar, and in Stypmann v. City and County of San Francisco, 557 F. 2d 1338 (1977), and the Second Circuit in Lee v. Thornton, 538 F. 2d 27 (1976), and Johns v. McKinley, supra, recognized the vital need of the individual to have use of his vehicle, and to have a prompt determination of his rights to recover his vehicle. A person whose property is seized should be able, within a reasonably prompt period of time, to make plans to resist a judicial forfeiture proceeding, or to acquire a substitute vehicle. The government claims a right to keep people in limbo for an indefinite period of time, despite it's acknowledgment at pages 33-34 of it's brief: "It is undoubtedly true that a claimant may desire a prompt ruling his remission petition, even if he has no opportunity to seek review of that decision and even if turns out to be unfavorable."

Congress directed the Secretary of Treasury in 19 U.S.C. 1618 to investigate whether a

property owner acted "without willful negligence or without any intention... to defraud... or to violate the law." The Secretary was directed by that statute to exercise his discretion in determining "the existance of such mitigating circumstances as to justify the remission or mitigation..." The Secretary was directed to act in a manner "as he deems reasonable and just..."

By this statute, Congress recognized that persons who might conduct themselves so as to subject their property to forfeiture are not subject to whim, or caprice, or arbitrary conduct of the government. The length of time which may be imposed upon the Secretary to act upon petitions for remission may be open to debate, but that some standard of reasonable promptness is required cannot be doubted.

III.

THE 36 DAY DELAY IN PROCESSING RESPONDENT'S PETITION FOR REMISSION WAS UNREASONABLE AS A MATTER OF LAW, AND THE $3600 FINE SHOULD BE RETURNED TO RESPONDENT. AT THE VERY LEAST, IT IS A QUESTION OF FACT FOR THE DISTRICT COURT TO DETERMINE WHETHER THE DELAY WAS UNREASONABLE UNDER THE STANDARDS SET FORTH IN $8850.

The government contends that the 36 day delay in processing the petition for remission was reasonable as a matter of law. The contrary is true where vehicles are concerned.

The Court in this case will pronounce a rule of law of general applicability. The Court is engaging in a rule making function, rather than merely adjudicating the merits of the case at bar. The Court must consider that the Customs Service will act in all cases under the guidelines established by its decision in this case.

Respondent, because of his financial circumstances, was able to post a bond within two weeks of the seizure and Customs returned the vehicle to him (Pet. at App. 19a). But the reasonableness of Customs acting upon a petition for remission cannot depend upon the financial means of the individual involved. Obviously, the Customs Service cannot know the financial resources of each person whose property is seized, and such a rule would deny persons equal protection under the laws depending upon their wealth.

Respondent, by posting a bond, cannot be deemed to have waived his right to a prompt resolution of his petition. Nothing in the record supports any inference that any such waiver was contemplated either by the government or respondent. Waivers of constitutional rights are not lightly implied. There is a strong presumption against against the waiver of fundamental constitutional rights. Fuentes v. Sheven, 407 U.S. 67, rehearing denied 409 U.S. 902 (1972).

The Court must make it's decision based upon the general likelihood of harm to an average citizen who may be deprived of his vehicle. Such deprivation of use can be of immense significance. In Seguin v. Eide, 720 F. 2d 1046, 1048, (9th Cir. 1984), the court noted:

> "Seguin was seventy-three years old, a partially crippled widow dependent on her car to move musical instruments necessary to her profession. We have noted elsewhere the special hardships that may result from even a short deprivation of a private automobile."

The court cited Stypmann v. City and County of San Francisco, 557 F. 2d 1338,1344 (9th Cir. 1977) and Lee v. Thornton, 538 F. 2d 27, 31 (2d Cir. 1976).

In Lee v. Thornton the court noted:

> "Deprivation of means of transportation for

such periods requires an opportunity to be heard. Moreover, the filing of a $250 bond was in insuperable obstacle to Lee, and may be too great an obstacle to many car owners seeking to force the government to proceed with forfeiture proceedings." (538 F. 2d 32)

In Johns v. McKinley, 753 F. 2d 1195, 1197, (2d Cir. 1985) the court noted:

"Johns submitted an affidavit... setting forth in greater detail the hardship Johns was suffering as a result of the delay in recovery of his cab. He stated that his contract with his employer was due to expire... and that although he would normally have anticipated no difficulty in renewing it, the delay in recovery of his cab was interfering with his performance of his obligations and could lead to the loss of his job. In addition, the delay in his return to gainful employment threatened his ability to make the installment payments due on the cab, thus creating the risk that even if the cab were eventually released by INS, a lengthy delay prior to such release might cause him to lose the cab to his finance company."

The reasonably foreseeable and likely prejudice to persons whose vehicles are seized goes beyond being stranded at a remote border point. For most people it involves an indefinite loss of mobility, loss of income, and possible loss of the vehicle itself. Vehicles are unique in this regard. A thirty day delay is "presumptively prejudicial" where a vehicle is concerned. It does not impose an unreasonable burden upon the government to act within thirty days upon petitions for remission.

The government, in it's brief at page 11 and at page 34, makes a thinly veiled threat that if this Court does not agree with its position, "the logical response for Customs would be

simply to deny all petitions that it cannot definitely determine to grant in very short order... This would place added burden on the government and the courts..." At page 34, the government says an adverse decision in this case would lead the Secretary to give "short shrift" to petitions and make "completely arbitrary decisions." Such a threat is both ignoble and empty. It ignores the government interest in avoiding the commitment of resources to judicial forclosure proceedings. It denies the Secretary's statutory responsibility to act in a "reasonable and just" manner. 19 U.S.C. 1618. This Court cannot yield to suggestions that a statutory duty will not be fulfilled if it is defined in a manner which is not pleasing to the agency.

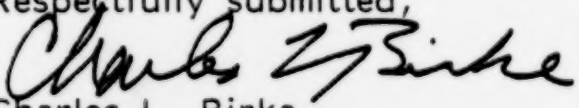
Respondent's automobile was seized on January 20, 1975, more than ten years ago. Respondent respectfully submits that he should not be required to litigate at the trial court level the issue of justification for the government's delay in processing the petition for remission. The government has at all times argued that it was not bound to act reasonably or with any degree of promptness in processing the petition for remission. The government admits it did not act with any such standard in mind. The government, at page 17 of it's brief, insists the remission procedure is one of "executive grace," despite the fact that it is established by statute and subject to due process requirements. As found by the Ninth Circuit in this case, respondent did assert his rights in the manner afforded him by the government. His submission of additional information could most reasonably be construed as an attempt to hurry the Customs Service into making a decision. Respondent suffered prejudice from uncertainty as to the status of the vehicle until respondent took it upon himself to post a bond. As noted above, the average

citizen will suffer much grevious prejudice for a much longer period. The government has never attempted to justify the delay. The affidavit submitted by the government in support of its petition for certiorari is hearsay, not part of the record, and should be disregarded. Under the balancing test of $8850, as a matter of law, respondent has been denied due process of law.

CONCLUSION

This $3600 litigation should finally come to an end. The court should direct that judgment be entered in favor of respondent for $3600 plus interest thereon from February 25, 1975, the date the balance of respondent's bond was refunded. (J.A. 18-19.)

Respectfully submitted,



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